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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 551.

CURACAO TRADING COMPANY, INC.,
Petitioner,

—against—

FEDERAL INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BIGHAM, ENGLAR, JONES & HOUSTON,
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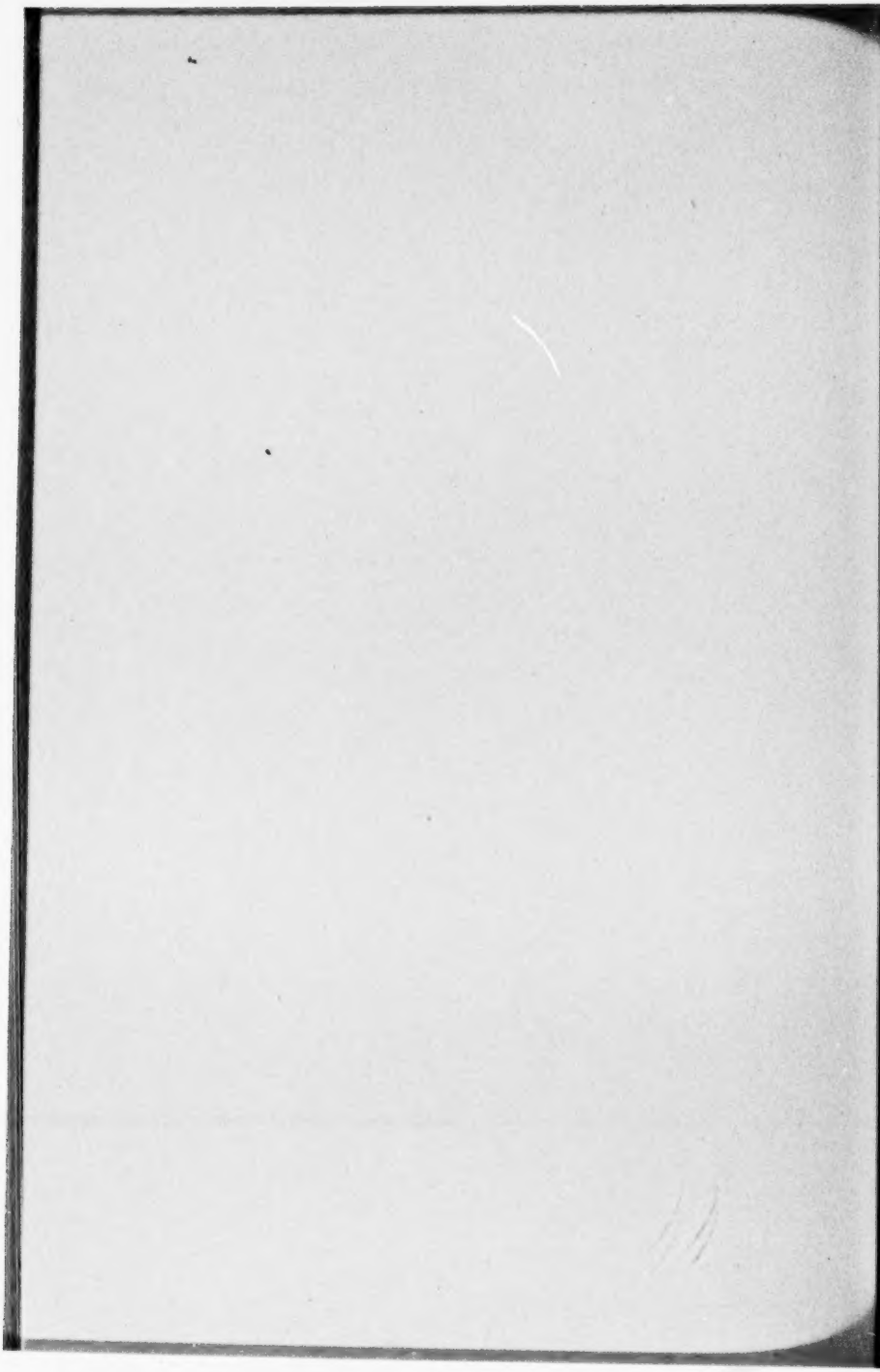
On the Brief.



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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The opinion of the Circuit Court of Appeals for the Second Circuit, which this Court asked to review is reported at 137 Fed. (2d) 911 and appears at pages 365-369 of the record. The opinion of the District Court is found at pages 268-274 of the record, and is reported in 50 Fed. Supp. 441. Jurisdiction rests upon diversity of citizenship.

This case presents no reason within Rule 38 for the issuance of a writ of certiorari. Contrary to the general assertions of the petition, the decisions below are not in conflict with any applicable decision of this Court, with any applicable decision of any other Circuit Court of Appeals, nor with any applicable local decision. In fact the decision below follows an almost identical summary judgment case arising out of the same warehouse fraud,

in which this Court declined to grant certiorari—*Nieschlag Co.* v. *Atlantic Mutual Ins. Co.*, 43 Fed. Supp. 797, affirmed on opinion below 126 Fed. (2d) 834, certiorari denied 317 U. S. 640.

The questions involved are simply whether parol evidence is admissible to change the nature of a pre-existing written insurance contract, complete on its face; and whether the District Court and the Circuit Court of Appeals were right in concluding that on undisputed facts, documentary evidence, and prior adjudications, there was no genuine issue of fact on the question of petitioner's lack of insurable interest in the subject matter of a policy of insurance.

Petitioner was fraudulently induced to lend money upon the security of spurious warehouse receipts. Petitioner believing the receipts to represent property actually in the warehouse took out insurance against "all risks of physical loss or damage including nondelivery". The holding below is simply that the insurance was property insurance; that petitioner had no insurable interest in the property; and that under Section 148 of the New York Insurance Law the claim must fail.

None of these questions is of general importance and none of them affect the public interest. They comprise merely, an isolated controversy between the parties to an ordinary mercantile transaction, which the Courts below have unanimously decided in respondent's favor, in accordance with the accepted and usual course of judicial proceedings.

Undisputed Facts Established by Documentary Evidence, Court Records, Admissions and Affidavits, as the Basis of the Summary Judgment.

While the facts are quite fully stated in the opinions of the Circuit Court of Appeals and the District Court, some brief review appears necessary *first* to indicate the undisputed and documentary character of these facts, and *second* because of certain misstatements and significant omissions in the petition and brief, which the record does not support.

Long before this controversy arose, to wit, on July 24, 1925 (19)* respondent issued to petitioner, in New York, an *open* policy of marine cargo insurance. That policy continued in effect, but was rewritten and reissued on July 31, 1935. A copy is found at Tab #27. William Stake & Co., Inc. (hereinafter referred to as "Stake"), was petitioner's insurance broker on both policies. The petition asserts that Stake was the agent of respondent, but the policy provides:

> "It is a condition of this policy that William Stake & Co., Inc., are the assured's brokers and agents and that this policy shall be continuous and covers subject to its terms * * *" etc. (Tab #27, typed clause #23).

The policy covered all *import* shipments consigned to petitioner, consisting of coffee, cocoa, etc.:

> "*Against physical loss or damage from any external cause, including non-delivery,* and landing, warehousing, forwarding and/or special charges if in-

* Numbers in parentheses refer to folios of the printed record. "Tab" numbers refer to the numbered tabs of the separate volume of exhibits.

curred, all irrespective of percentage" (Tab #27, typed clause #5).*

and, being an *open* one, required petitioner to *report* all risks as soon as known, and to *declare* the amount of such risks (for premium purposes) as soon as ascertained.

The policy is extended by a typewritten endorsement (hereinafter called "the warehouse endorsement") to cover the assured's interest in imported cocoa and coffee "while temporarily detained anywhere within the limits of the United States of America * * * in stores or warehouses" against the risks of fire, lightning, etc., and also against the "all risks of physical loss or damage including non-delivery".** Under this endorsement imported merchandise in which the assured has an interest is *automatically* covered in *any* warehouse up to the amount of $75,000. For coverage in excess of $75,000 the warehouse must be approved by the underwriter (Clause #4).

The present controversy arose as follows: On March 31, 1939 petitioner made a written contract (762-773) with Garcia Sugars Corporation (hereinafter called "Garcia") in which petitioner agreed to lend Garcia $90,500, against the security of certain cocoa beans which Garcia warranted it owned "free and clear" and were stored in a licensed warehouse (763), delivery to be made by warehouse receipt; and petitioner agreed to insure the cocoa against all risks including "non-delivery" at Garcia's expense (767). Petitioner sampled certain cocoa beans located in Harbor Stores Warehouse at Long Island City, New York, (complaint 631-632). The loan was made, and on April 3, 1939 Garcia delivered to petitioner three warehouse receipts (Tabs #23, 24, 25).

* All italics ours unless indicated otherwise.

** The warehouse endorsement is the fourth typewritten page of Tab #27, and contains twelve clauses numbered 1 to 12.

Petitioner borrowed the money from the Grace Bank and had to supply the bank with evidence of insurance on the merchandise (Trust Receipt, Tab #28, Clause 6). Petitioner therefore caused a certificate of insurance to be issued under the open policy.

The certificate (Tab #26) is dated April 3, 1939. On its face the relevant provisions are:

> "This is to certify that on April 3, 1939 this Company insured under policy No. 054711 for Curacao Trading Company, Inc. on 18,480 bags Cocoa Beans * * * Located at Harbor Stores Corporation * * * from April 3, 1939 to date or dates of removal * * * loss is payable * * * to Grace National Bank &/or The Assured, as interest may appear * * *. Subject to terms and conditions of the policy against physical loss or damage from any external cause, including non-delivery" (Tab #26).

and on the back was contained a description of the cocoa beans and the warehouse receipts. The certificate was accepted and retained by petitioner without question or objection (79, 92). No certificate of insurance was necessary for coverage under the open policy. That coverage is automatic. The certificate was needed only as evidence to the bank that the open policy was in effect and would apply in accordance with its terms. The manner of issuing the certificate was this:

Before advancing the money to Garcia, Frans Vandervygh, co-manager of petitioner, talked to James Christie, Vice-President of Stake, several times. The time was between March 29th and March 31st (87-93, 33). Christie saw, in its unsigned form, the contract with Garcia (33) and learned the details of the loan (207). Christie then went to the office of Chubb & Son, Managers of Federal Insurance Company, and spoke to

William A. Bonner, the marine cargo underwriter (33, 45-46, 208). Cocoa to a value of $75,000 would be automatically covered under the warehouse endorsement so Christie asked Bonner if Federal would approve Harbor Stores Warehouse for coverage on cocoa beans under the Curacao open policy for approximately $100,000 (33, 45, 208). Bonner checked the filed rate card on this warehouse and said that he would approve it (33-34, 45). Christie then told Bonner a certificate of insurance would be required (209) and a declaration under the open policy would be made in due course (34, 45). Thereupon petitioner supplied Christie with the description of the cocoa beans. Christie filled in the blank certificate, countersigned it, and delivered it to petitioner (34). A copy was sent to respondent to advise it that it was at risk (35) and petitioner later reported to respondent the values thought to be at risk, and paid the premium thereon (36).

Thus the situation stood until Garcia's fraud came to light. In May 1939 petitioner's demand upon the warehouse was refused. Both Garcia and the warehouse were adjudicated bankrupt in the United States District Court, Southern District of New York (645, 647). Many other claimants made demand for their goods in the warehouse and an omnibus reclamation proceedings was instituted in the Harbor Stores bankruptcy (63-65) to require petitioner and every other claimant to prove their claims. Certain of the other claimants, to wit, General Cocoa Co., Inc., M. Golodetz & Co., Commodity Investors, Inc., and Cocoa Trading Corporation (hereinafter referred to as "adverse claimants") made claim to the lots of beans described in the warehouse receipts held by petitioner (63-64). *These adverse claimants proved on trial that they had actually deposited the cocoa beans in the warehouse, that their warehouse receipts bore dates earlier*

*than those of petitioner, and that their receipts represented goods actually placed in store.** Petitioner proved only its warehouse receipts and its loan to Garcia (65). Carlos Garcia testified that his company never had any cocoa in the warehouse (67-72). The Referee awarded the cocoa beans claimed by petitioner to the adverse claimants by four orders entered in the reclamation proceedings on July 27th and August 4, 1939. These orders appear at pages 159 to 173 of the record. Petitioner's claim was dismissed by order entered on August 8, 1939 on the grounds that petitioner was not "the owner of or entitled to the possession of any bags of cocoa beans in the warehouse". That order was reviewed by another unsuccessful claimant and was affirmed by Judge Coxe (29 Fed. Supp. 749). The following year, petitioner resettled the latter order so as to provide that the receivers and trustees never "come into possession of any bags or cocoa beans to which Curacao Trading Company, Inc. had ownership, title or interest superior to that of the" adverse claimants. Judge Goddard resettled the order for the declared reason that appellant might not be prejudiced in its claim against the Insurance Company in the present suit (see 33 Fed. Supp. 361-362 and fols. 74-75).

It was therefore established by the undisputed documentary and record evidence that petitioner never had any right, title or interest in the cocoa beans described in the insurance certificate. Indeed petitioner by Vandervygh, its Manager, admits that the warehouse receipts were fraudulently issued (896). It was upon such a

* See Referee Ehrhorn's certificate in Bankruptcy No. 74017 and Judge Coxe's opinion in 29 Fed. Supp. 749; also folios 63-65. All testimony, exhibits, pleadings, orders, etc., in the reclamation proceedings were incorporated by reference in the moving papers on this summary judgment motion, folios 438, 446.

clear record that the Courts below decided that there was no "genuine issue as to any material fact" and granted summary judgment in accordance with Rule 56 (c). In doing so the Courts below followed an almost identical case arising out of the same fraud. *Nieschlag Co. v. Atlantic Mutual Ins. Co.*, 43 Fed. Supp. 797, affirmed 126 Fed. (2d) 834, certiorari denied 317 U. S. 640.

Argument.

Petitioner's argument advances four propositions which we shall answer in the same order.

POINT I.

Petitioner's lack of insurable interest in the cocoa beans was established by uncontradicted documentary evidence, and prior adjudication. No genuine issue of fact remained.

(Answering Petitioner's Points I and II.)

Petitioner's Point I complains that it was denied a trial upon the issue of its ownership of the cocoa beans described in the warehouse receipts and the certificate of insurance. Both the District Court and the Circuit Court of Appeals held that on this question there was no "genuine issue" of fact.

It will be remembered that, before this summary judgment motion was made, petitioner had fully litigated this very issue, *i. e.*, its ownership of these cocoa beans, to a final adjudication in the same District Court. The end result of that litigation is reported in *In re Harbor Stores Corporation*, reported in 29 Fed. Supp. 749, and in 33 Fed. Supp. 361. There, upon the strictest common law

proof, it was adjudicated that cocoa beans described in petitioner's warehouse receipts were the property of other claimants who (or whose predecessors in title) actually deposited the cocoa in the warehouse. The orders of the Bankruptcy Court awarding the cocoa to the true owners are printed at pages 159-173 of the record. When those orders were taken up for review by another unsuccessful claimant (Clinton Trust Company) they were affirmed by the District Judge (29 Fed. Supp. 749). On petitioner's motion to resettle the order which dismissed its claim, the District Judge again held that "these (petitioner's) warehouse receipts were fraudulently issued"; that "the Referee, after hearings, awarded the cocoa to other claimants—the ones who actually deposited the cocoa in the warehouse" (*In re Harbor Stores Corporation*, 33 Fed. Supp. 360, 361). The latter proceeding was instituted by petitioner solely, as the opinion indicates, that its claim in the case at bar might not be prejudiced, and prejudiced it was not. In the instant case petitioner was given every opportunity to adduce further proof that it had an interest in the cocoa but it failed to do so. The facts before the Court on this motion were identical with those before it on the prior adjudication.

All the testimony, exhibits, pleadings, orders of these prior adjudications were before the Court on this motion. They were summarized in the moving affidavits (62-76, 435-439, 446-475), and were expressly incorporated therein by reference (438, 446, 66). The Court, moreover, was required to give judicial notice to its own prior adjudication (*Fletcher* v. *Evening Star*, C. C. A., D. C., 114 Fed. (2d) 582, 587, certiorari denied 312 U. S. 694).

We do not contend, and neither did the Courts below hold, that the prior adjudication was technically *res adjudicata*. It could not be because respondent was not

a party to it. But we do say that petitioner cannot raise a *genuine issue* of fact (Rule 56 (c)) by striving to relitigate in a new action the precise question once decided against it; especially when no new facts are produced, and when the undisputed facts so compellingly demonstrate that the same result must be reached. It is the office of the summary judgment motion to penetrate such fictitious issues and put an end to futile litigation.

> "Our previous decisions are not technically *res judicata* as between appellant and appellee, since the latter was not a party to any of the prior proceedings. But those determinations are conclusive against appellant, unless we are now to repudiate what we have done repeatedly and consistently whenever the issues involved in them have been raised." (*Fletcher* v. *Evening Star Newspaper Co.*, 114 Fed. (2d) 582, 583, certiorari denied 312 U. S. 694.)

But respondent's position does not rest solely upon the prior adjudications. This whole record demonstrates conclusively the absence of any "genuine issue as to any material fact" (Rule 56 (c)).

Petitioner's claim of interest in the cocoa beans rests solely and exclusively upon its contract with Garcia (762-773) and the naked warehouse receipts. It is admitted that petitioner never deposited a pound of cocoa in the warehouse. Carlos Garcia, President of Garcia Sugars Corporation, signed the contract with plaintiff (773). He pleaded guilty to criminal charges of fraud and is in States Prison (73). Garcia testified in the reclamation proceeding (66). His testimony there was uncontradicted, and corroborated by the warehouse records. He swore that he had defrauded petitioner, and that the cocoa supposed to be represented by petitioner's warehouse receipts never was in the warehouse. This testimony is quoted at folios 67-72 of the record.

Complete and detailed corroboration of Garcia's testimony, and of the prior adjudications, was before the Court in the form of the original records of the warehouse. It will be noted that the bags of cocoa claimed by petitioner are identified by certain bag (identifying) marks (see Tabs #23, 24 and 25) which appear on the warehouse receipts. These marks connect the warehouse receipts to the particular bags they are issued against. At the time of this motion the original warehouse records were in the custody of the Court, having been placed in the safekeeping of its officer, the Trustee in Bankruptcy of Garcia Sugars Corporation (446). These original records were examined by counsel for petitioner and for respondent, and by the secretary of the warehouse, for purposes of this motion (437). Based upon such examination the secretary of the bankrupt warehouse made an affidavit (440-476) in which, as the District Judge said (805-806), he traced every ounce of cocoa beans bearing the marks which appeared on petitioner's receipts, from the time such cocoa was deposited in the warehouse down to the date of the bankruptcy, and the records proved that every bag claimed by petitioner was covered by a prior warehouse receipt issued to the persons who actually deposited the cocoa (440-476). The cocoa petitioner claimed was then traced into the four reclamation orders by which the bankruptcy court awarded it to its true owners (477-517).

Petitioner's submission on this motion offered not one whit of evidence contradicting the plain state of this record proof. It offered merely a subsequent affidavit by the warehouse secretary, Mr. McMackin (591-604), to the effect that he had no personal knowledge of the physical facts recorded in the warehouse records. The records were *warehouse* records made in the regular

course of the *warehouse* business (443), and the District Judge so found (805). They record the deposit and withdrawals of property, the issuance and surrender of receipts (443), and intrinsically evidence the established warehouse routine. They fulfill all the requirements of 28 U. S. C. 695. They were clearly admissible. *Palmer v. Hoffman*, 318 U. S. 109.

This overwhelming weight of record and documentary proof drew nothing but naked and unsupported denials from petitioner. Obdurate and persistent denial of record facts does not create a genuine issue of fact, and that is all the Courts below held on this point.

POINT II.

The insurance contract consisted of the open policy and the certificate. Parol evidence of the broker's alleged representations was inadmissible to vary the written contract, complete on its face.

(Answering Petitioner's Point III.)

It was obvious from the written insurance contract and from the documentary proof that petitioner's claim must fail unless it could change the nature of the insurance contract by parol evidence. That is what petitioner sought to do below, and that is what both courts held could not be done.

The open policy of insurance held by petitioner (Tab #27) dates back to July 31, 1935. The insurance certificate (Tab #26) was issued "under" and "subject to the terms and conditions of the policy". The policy and certificate are one, and constitute the insurance contract. *Brandyce v. G. & R. Fire Ins. Co.*, 252 N. Y. 69, 72; *Royster Guano Co. v. G. & R. Fire Ins. Co.*, 252 N. Y.

75; *N. Y. & Oriental S. S. Co. v. Auto Ins. Co.*, 37 F. (2d) 461. And see Thayer on Marine Insurance Certificates, 49 H. L. R. 239.

The certificate here in question was issued on April 3, 1939. It was accepted and retained by petitioner without question or objection (79, 92) as the Circuit Court of Appeals noted in its opinion (R., p. 367). It was not until after the fraud became known that petitioner claimed that the insurance contract rested partly on parol (941).

The parol evidence which the Courts below excluded was certain alleged "representations" claimed to have been made in a conversation between the insurance broker (James A. Christie, Vice-President of Wm. Stake & Co., Inc.) and petitioner's co-manager (635-638). This evidence, respondent contended and the Courts below held, was inadmissible for the following reasons:

(1) Aside from the parol evidence rule the alleged conversations were not binding upon respondent because the policy provides:

> "It is a condition of this policy that Wm. Stake & Co. Inc. are the assured's broker and agents and this policy shall be continuous * * *" (Tab #27, Type clause #23).

and Stake was therefore, by contract, petitioner's own agent. Additionally the Insurance Department of the State of New York certified to the District Court that Stake was not the licensed agent of respondent (see Certificate Tab #1).

(2) Stake was admittedly petitioner's insurance broker, having placed for petitioner some 102 policies with other insurance companies in the last ten years (17-18), a list of such policies appearing at Tab #2. It is the un-

questioned law of New York that the insurance broker is the agent of the assured. *Allen et al. v. German-American Ins. Co.*, 123 N. Y. 6; *Mord v. Hartford Accident & Indemnity Co.*, 245 N. Y. 279; *Clinchy v. Grandview Dairy Inc.*, 283 N. Y. 39, 43; *Northrup v. Piza*, 43 App. Div. 284, affd. 167 N. Y. 578; *Wright v. American Equitable Assurance Co.*, 131 Misc. 215, 218; *In re Sommer*, 12 N. Y. S. (2d) 47, 49; *Salzano v. Marine Ins. Co. Ltd.*, 173 App. Div. 275, 281-282.

(3) Even assuming Stake had some kind of authority, there is absolutely no evidence in the record that Stake had authority to bind risks for respondent, or by parol or otherwise, to change the nature of its written contracts of insurance. *Drennan v. Sun Indemnity*, 271 N. Y. 182; *Allen v. German-American Ins. Co.*, 123 N. Y. 6; *De Grove v. Metropolitan*, 61 N. Y. 594.

(4) Even assuming the alleged statements were made and that the broker had authority to make them, they were properly excluded under the parol evidence rule. *Mitchill v. Lath*, 247 N. Y. 377, 379, 380-381; *El Dia Ins. Co. v. Sinclair*, 228 Fed. 833 (C. C. A. 2); *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317, 322; *Pindar v. Resolute Fire Ins. Co.*, 47 N. Y. 114, 117-118.

(5) The counter-signature of the certificate by Stake did not *create* insurance. It merely certified that the existence of insurance under the automatic coverage provisions of the open policy (Arnould on Marine Insurance, 12th Ed., Sec. 186; *French American Banking Corp. v. Fireman's Fund*, 43 Fed. Supp. 494; Winter on Marine Insurance, 1929, pp. 56-58; Thayer on Marine Insurance Certificates, 49 H. L. R. 239; *Brandyce v. G. & R. Ins. Co.*, 252 N. Y. 69). Authority to countersign such a certificate therefore was merely authority to certify

to the existence of insurance under the open policy and no more. Such authority contained its own limits and it is self-evident that authority to certify to the existence of insurance under a given policy does not include authority to make a new contract at variance with such policy.

What petitioner really sought to do by parol was to change the nature of the written contract from "property insurance" into a bond guaranteeing the warehouseman's obligation to deliver (R., p. 368). It is significant that respondent's charter powers do not extend to the issuance of such bonds (see Charter Tab #5 and License Tab #6). The New York Insurance Department so certified to the District Court (Certificate Tab #7). The record presented no "genuine issue of fact" on these matters.

POINT III.

The subject matter of the insurance was property. The perils insured against were "all risks of physical loss or damage including non-delivery". Under Section 148 of the New York Insurance Law petitioner had no insurable interest.

(Answering Petitioner's Point IV.)

It is solely because one of the insured perils was "non-delivery" that petitioner is able to confuse and obscure the simple and well-settled principles of insurance law decided below. If this loss had been caused by another peril—say fire, non-coverage would be a self-evident and immediate conclusion. Here however the property was insured, not only against all risks of physical loss, but also against the risk of "non-delivery". This has enabled petitioner to argue that the "non-delivery" peril con-

stituted title insurance; that it warranted the very existence of, and title to, the goods which were insured. That argument can be made only if every other word in the policy and the certificate is ignored. But that is just what petitioner does here. The District Court adequately answered this in its opinion at folios 812-817, and we need not repeat it here. The Circuit Court of Appeals said to give assent to petitioner's argument would change the nature of the insurance from property insurance to a guaranty of the warehouseman's obligation to deliver non-existent property (R., p. 368).

The meaning of the "non-delivery" peril in a contract of marine insurance is clear. It is common knowledge that ocean carriers and warehousemen sometimes fail to deliver the goods entrusted to them. Because of the bailment it is frequently impossible for an assured to prove the exact nature of the peril which, under such circumstances, caused the loss. Therefore underwriters have designated mere "non-delivery" as an insured peril. (See Winter on Marine Insurance (1929), page 163, and see also *Nieschlag Co.* v. *Atlantic Mutual Ins. Co.*, 43 Fed. Supp. 797.) It is clear therefore that "non-delivery" as an insured peril must have a subject matter (insured goods) upon which to operate. Here the subject matter was absent.

The New York Insurance Law, Section 148, forbids the enforcement of an insurance contract unless insurable interest exists. It provides:

> "§148. Insurable interest in property.—No contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured. The term 'insurable interest,' as

used in this section, shall be deemed to include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage."

It is not questioned here that petitioner had no "lawful and substantial economic interest in the safety or preservation" of the 18,480 bags of cocoa beans described in the insurance certificate, which had already been adjudicated as wholly owned by others. There was therefore nothing upon which the "non-delivery" peril could operate.

POINT IV.

This case presents no ground for the granting of a writ of certiorari.

Despite petitioner's general statements, the petition and brief fail to name a single applicable decision of a Circuit Court of Appeals, or of the local Courts, with which the instant case is in conflict. None of the grounds for the granting of a writ, set forth in Rule 38, is found in this record. Quite the contrary this Court has already declined to grant certiorari to the Second Circuit Court of Appeals in an almost identical case, which arose out of the same warehouse fraud, and in which the Court granted summary judgment.

> *Nieschlag Co.* v. *Atlantic Mutual Ins. Co.*, 43 Fed. Supp. 797, affirmed 126 Fed. (2d) 834, certiorari denied 317 U. S. 640.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari is without merit and should be denied.

Dated: January 10, 1944.

Respectfully submitted,

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